

# Raising the Bar: Maples v. Thomas and the Sixth Amendment Right to Counsel

# Raising the Bar: *Maples v. Thomas* and the Sixth Amendment Right to Counsel

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My course on the American death penalty has more than its share of dramatic and powerfully engaging issues and cases. Should the death penalty be limited to the crime of murder, as a matter of policy or of constitutional law? Is it constitutional to execute juvenile offenders or those with mental retardation? What role does race play in the capital justice system, and what is its constitutional significance? But I have never seen my students more avid and appalled than last semester, when they encountered the Court's recent decision, per Justice Ginsburg, in *Maples v. Thomas*,[1] issued in January of last year.

The case involved a prisoner on Alabama's death row, Corey Maples, whose conviction and death sentence were upheld on direct appeal. In state post-conviction proceedings, Maples was represented pro bono by two young lawyers from Sullivan & Cromwell in New York—a role that many of my students could imagine themselves playing in the not-too-distant future. These two associates filed Maples's state habeas petition, alleging ineffective assistance of trial counsel among other trial infirmities. While this petition was pending in the Alabama trial court, the two associates left Sullivan & Cromwell for other employment opportunities, but failed to move for substitution of counsel or even to inform the Alabama court or Maples himself of their departure. When Maples's state habeas petition was denied, notices of the court's order were sent to the associates at Sullivan & Cromwell's address in New York, where the mail-room clerk marked them "return to sender" and sent them back, unopened, to the trial court clerk, who attempted no further mailing. After the clock ran

out on Maples's chance to file an appeal from the denial of his state habeas petition, the Alabama Attorney General sent a letter directly to Maples informing him—for the first time—of the missed deadline and notifying him that he had four weeks in which to file a federal habeas petition. Maples called his mother, and his mother called Sullivan & Cromwell. The law firm tried to convince the Alabama courts to give them another chance to meet the appeals deadline, going all the way to the Alabama Supreme Court. But Alabama's position, upheld by its courts, was that the trial court clerk had met the state's obligations by sending notice of the trial court's order to the New York lawyers' address of record. The state trial court maintained that it was "unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner."[2]

Having procedurally defaulted his state habeas appeal, however, Maples was then held to be barred from federal habeas corpus review as well. Because state prisoners do not have a constitutional right to counsel on state habeas review, their state habeas counsel's mistakes cannot ordinarily constitute "cause" to excuse a state procedural default, because such counsel is presumed to be acting as the prisoner's agent, rather than as some force "external" to the prisoner. In other words, generally state prisoners are stuck with their lawyers' mistakes on state habeas, where a default will then bar all further review on the merits of their claims in both state and federal courts. In light of this precedent, the federal habeas court denied review of Maples's claims as procedurally defaulted, and the Eleventh Circuit affirmed.

Justice Ginsburg, writing for a 7-2 majority of the Court, noted that while the general rule of habeas counsel "agency" need not be disturbed, a "markedly different situation is presented . . . when an attorney abandons his client without notice."[3] Abandonment is unlike any other form of attorney negligence or error, in that the rationale of attorney "agency" fails in such circumstances. In Justice Ginsburg's words, "[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not

representing him."[4] Finding that the circumstances of Maples's case did indeed establish such abandonment, the Court held that "principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples's procedural default."[5]

This holding is a rather modest and common-sense modification of federal habeas corpus law—so modest and common-sensical that it did not produce the kind of ideologically split decision that one often sees in other habeas or death penalty cases. Not only Justice Kennedy, the usual swing vote, joined the Court's opinion, but Chief Justice Roberts and Justice Alito did so as well. What makes Justice Ginsburg's opinion for the Court in *Maples* noteworthy—and what made it controversial among the Justices, to the extent that it was—was Justice Ginsburg's explicit connection of the breakdown of representation in Corey Maples's case to Alabama's system of capital representation for indigent defendants.

Justice Ginsburg began her analysis—Part I, Section A of her opinion, front and center—with a description of the conditions facing trial counsel in death penalty cases in Alabama, noting the low eligibility requirements in terms of experience and training for capital defense lawyers, the inadequate compensation provided to such lawyers, and the fact that Alabama is nearly alone among the states in failing to provide indigent capital defendants with court-appointed lawyers on state habeas review. Justice Ginsburg went on to describe the particular circumstances surrounding Maples's case: Only one of his two lawyers had ever previously served in a capital case, and neither one had ever tried the penalty phase of a capital case. Compensation for each lawyer was capped at $1,000 for out-of-court work preparing Maples's case, and at $40/hour for in-court services.

Although Justice Ginsburg simply sketched the basic facts about Alabama's indigent capital defense system without much editorial comment, the implications were obvious: First, Corey Maples's post-conviction challenge to the adequacy of his trial counsel—his main claim advanced, and defaulted, on state habeas review—might well have been meritorious, given the prevailing conditions. This likelihood heightened the "fundamental fairness" concerns at issue in the case, and by broader

implication in all of Alabama's capital cases. Second, Alabama's failure to provide counsel for indigent capital defendants on state habeas review was the impetus for the involvement of the Sullivan & Cromwell associates (and many other pro bono counsel from big law firms) in Alabama's capital defense system. This recognition suggests that Alabama's choice to require capital defendants to rely on the charity of the public interest and pro bono bar during the crucial stage of state habeas review implies some state responsibility—moral if not legal—for the breakdowns that will inevitably occur in such a system.

These implications were controversial among the Justices. Justice Alito, who joined the Court's opinion, nonetheless concurred separately in order to absolve Alabama of responsibility for the breakdown of representation in Maples's case. In Justice Alito's view, the breakdown was the one-off product of "a perfect storm" of "unique circumstances."[6] He failed to see, he wrote, "any important connection between what happened in this case and Alabama's system for providing representation for prisoners who are sentenced to death."[7] Justice Scalia, who dissented along with Justice Thomas, was even more dismissive of the implied connection between Alabama's indigent defense system and Maples's case, describing the portion of the Court's opinion detailing Alabama's indigent defense procedures as "inexplicable."[8]

But the great strength of this opinion—and of Justice Ginsburg's opinions and votes in other right-to-counsel and death penalty cases—is the recognition that the larger problem of which Corey Maples's case is only a part is not one of bad apples or "perfect storms." Rather, there are systemic failures across the country in the provision of defense counsel services to the indigent. Justice Ginsburg has been an influential voice on the Court to address these problems, both by expanding the situations in which the right to counsel obtains and by policing the implementation of the right. Justice Ginsburg wrote the majority opinions in *Alabama v. Shelton*,[9] which required counsel in cases where the defendant receives a suspended sentence of incarceration, and in *Halbert v. Michigan*,[10] which required counsel for defendants who seek to appeal guilty pleas,

the primary engine of disposition in our current criminal justice system. In a rare recognition by the Court of the implication of systemic failures, Justice Ginsburg wrote a majority opinion in a constitutional speedy trial case holding that delay resulting from "systemic breakdown in the public defender system" should be charged to the state rather than to the defendant.[11] Moreover, she has been a staunch supporter of maintaining performance standards for indigent defense counsel, penning a lone concurrence in *Harrington v. Richter*,[12] to argue that counsel was deficient for failing to consult blood experts in Richter's noncapital murder trial, and joining slim majorities to require adequate investigation of mitigating evidence by defense counsel in a series of important capital cases.[13]

My students are transfixed by Corey Maples's case—in large part, perhaps, by the scary *schadenfreude* of seeing two recent law grads fail so egregiously and so publicly. But many of my students are also outraged by the window the case opens onto the structure of indigent criminal defense in Alabama, especially in capital cases. Justice Ginsburg helps us make sense of the view by situating the injustice in Maples's case in the larger capital justice system. By doing so, she urges all of us in the legal profession to keep our eyes on these systemic injustices, as she continues to do, vigilantly, from the high Court.

## Endnotes

1 132 S.Ct. 912 (2012).
2 *Id.* at 921 (quoting state trial court).
3 *Id.* at 922.
4 *Id.* at 923.
5 *Id.* at 927.
6 *Id.* at 929 (Alito, J., concurring).
7 *Id.* at 928.

8 *Id*. at 934 (Scalia, J., dissenting).

9 535 U.S. 654 (2002).

10 545 U.S. 605 (2005).

11 *Vermont v. Brillion*, 129 S. Ct. 1283, 1292 (2009) (quoting state supreme court opinion).

12 131 S. Ct. 770, 793 (2011) (Ginsburg, J., concurring).

13 *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005).